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No. 798

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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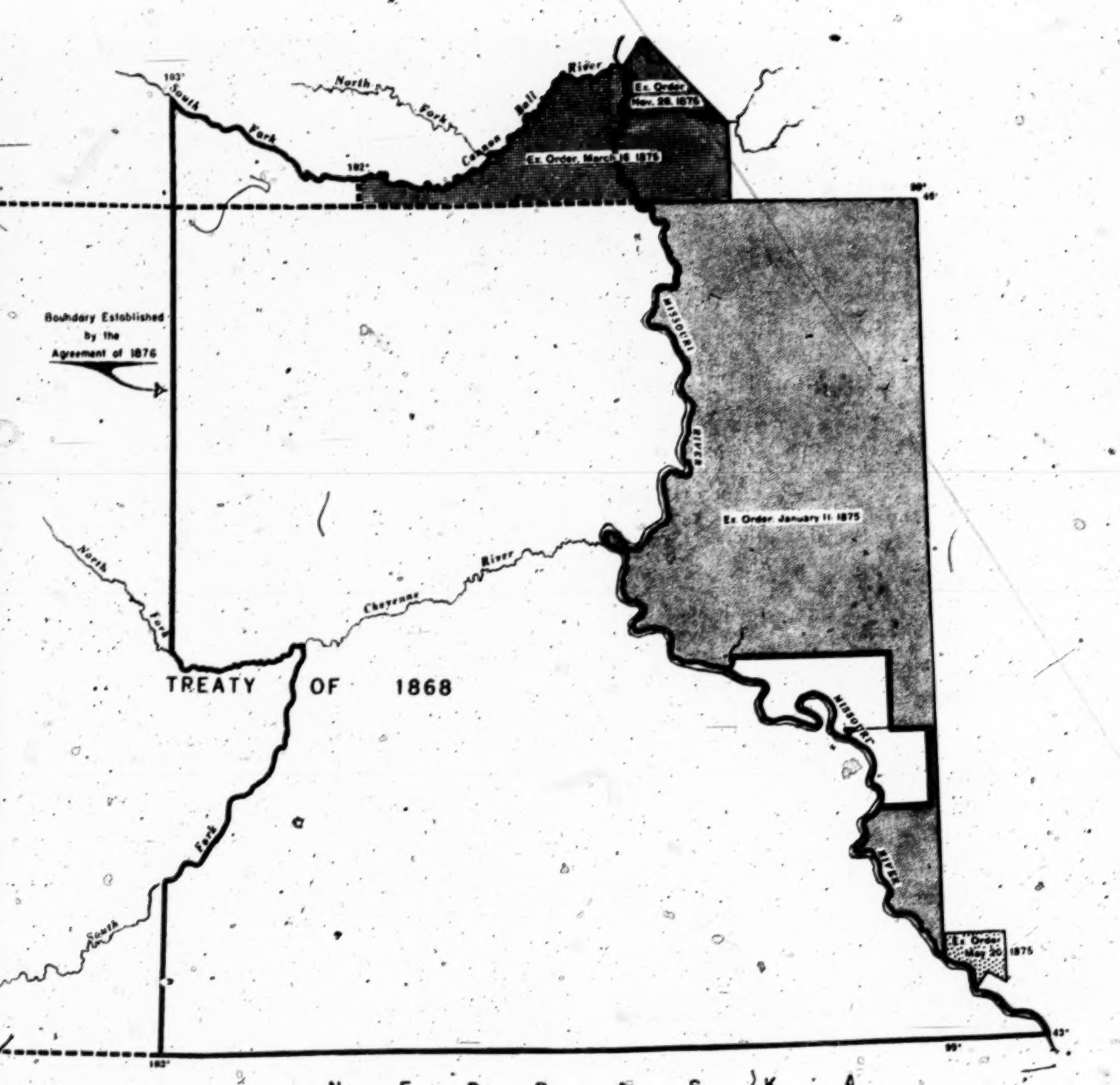
103°
South Fork
North Fork
Cannon Ball River
Ex. Order Nov. 28, 1876
Ex. Order, March 16 1875
102°
46°
Boundary Established by the Agreement of 1876
MISSOURI RIVER
Ex. Order January 11 1875
North Fork
Cheyenne River
TREATY OF 1868
MISSOURI RIVER
South Fork
Ex. Order May 20 1875
43°
103°
102°

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OPINION BELOW

The opinion of the Court of Claims (R. 20–30) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered April 7, 1941 (R. 30). A motion by the petitioner for a new trial was denied on October 6, 1941 (R. 30–31). The petition for a writ of certiorari was filed on December 12, 1941, and granted on February 9, 1942. The jurisdiction of this Court is invoked under Section 3 of the Act of

February 13, 1925, as amended by the Act of May 22, 1939.[1]

QUESTIONS PRESENTED

1. Whether Congress authorized the President to grant to Indian tribes beneficial ownership of portions of the public domain so as to render the United States liable to pay compensation upon reopening the lands for settlement.

2. Whether four executive orders setting aside portions of the public domain "for the use of" the Sioux Indians, executed for the purpose of suppressing liquor traffic with the Indians, attempted to grant to the Sioux such beneficial ownership as would render the United States liable to pay compensation upon reopening the lands for settlement.

3. Whether by the agreement of 1876 the Sioux Indians relinquished all claims to lands outside the permanent reservation defined in the treaty of 1868 and in that agreement.

TREATY, STATUTES, AND EXECUTIVE ORDERS INVOLVED

The relevant portions of the Fort Laramie Treaty of 1868 with the Sioux Indians are set forth in Appendix A, pp. 48–50, *infra*. The Executive Orders of 1875 and 1876 withdrawing from settlement the lands here involved are set forth in Appendix B, pp. 51–53, *infra*. The Executive

[1] c. 140, Stat. 752.

Orders of 1879 and 1884, restoring the lands to the mass of the public domain are set forth in Appendix C, pp. 54–56, *infra*. The material parts of the Act of August 15, 1876, appropriating monies for the subsistence of the Sioux and the material parts of the Agreement of 1876 made pursuant to that Act, are set forth in Appendix D, pp. 57–59, *infra*, together with a list of subsequent Acts appropriating monies for the subsistence of the Sioux in accordance with that agreement.

STATEMENT

The judgment under review (R. 30) dismissed a petition (R. 1–6) seeking to recover compensation for 5,667,016.74 acres of land alleged to have been granted to petitioner by four orders of the President in 1875 and 1876 and to have been "taken" by other executive orders issued in 1879 and 1884.

The material facts, as found by the Court of Claims, may be summarized as follows:[2]

The Treaty of 1868.—Article 2 of the Fort Laramie Treaty of 1868, 15 Stat. 635, between the United States and the Sioux Tribe set apart "for the absolute and undisturbed use and occupation"

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[2] For the convenience of the Court a map has been placed inside the front cover of the brief. It shows the boundaries of the Great Sioux Reservation as established by the Treaty of 1868 and as changed by the Agreement of 1876. It also shows the lands included in the four Executive Orders of 1875 and 1876.

of the Tribe the Great Sioux Reservation described as follows:

> commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river[1] * * *.

By the same article the Indians relinquished "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided." By Articles 11 and 15 the Indians agreed to regard the reservation as their home and promised not to make permanent settlement elsewhere, although by Article 11 they reserved the right to hunt on lands north of the

[1] The existing reservations were the Winnebago and Crow Creek Reservations established pursuant to the Act of February 21, 1863, c. 53, 12 Stat. 658, and the Act of March 3, 1863, c. 99, 12 Stat. 774, 784–785 (R. 9). These reservations are the white areas shown on our map as lying just east of the Missouri River surrounded on three sides by the shaded area.

North Platte River. Article 16 designated the hunting ground as "unceded Indian territory" and the United States agreed not to permit white men to settle there.

The Executive Orders of 1875 and 1876.—By virtue of the treaty, the lands east of the Missouri River (except the Winnebago and Crow Creek Reservations shown in white on our map) and the lands north of the forty-sixth parallel (shown as a heavy dotted line on the map) became a part of the public domain. White men "infested" these lands, taking advantage of the easy access to the reservation to sell liquor to the Indians across the river. On January 8, 1875, the Commissioner of Indian Affairs recommended that the Secretary of the Interior request the President to withdraw from sale and set apart for Indian purposes a tract of approximately 5,600,000 acres along the east bank of the Missouri River. The Commissioner stated that the withdrawal was "necessary for the suppression of liquor traffic with the Indians." Accordingly, on January 11, 1875, the President signed an order directing that the described lands be "withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation."* (R. 8–9.)

* Such an addition to the reservation was necessary so as to make this portion of the public domain "Indian country," thus enabling the Government to punish not only the sale but also the introduction of liquor into the area. See R. S. Sec. 2139, 25 U. S. C., Sec. 241.

The Indian agents in the vicinity were advised of the reason for the withdrawal (R. 9). So also were settlers upon the land who were told that (R. 10):

> This order does not affect existing rights of any persons, residents within the limits of the Territory withdrawn, nor is it supposed that the withdrawal will be made permanent, or that any purchases will be made by the Government of property owned by individuals, in the tract of country withdrawn. There will be no interference with the legitimate business pursuits of any persons lawfully residing within the said limits.

Even after the order of January 11, 1875, had been issued, there remained open a few points along the river which afforded liquor dealers ready access to the reservation. Accordingly, on March 16, 1875, May 20, 1875, and November 28, 1876, upon the recommendations of the Commissioner of Indian Affairs and the Secretary of the Interior, three additional tracts aggregating a little over 1,000,000 acres were withdrawn from sale by executive orders and set apart "for the use of" the Indians (R. 10–14).

The Executive Orders of 1879 and 1884.—In 1879 the Commissioner of Indian Affairs concluded that most of the lands covered by the earlier orders could be reopened to settlement without endangering the interests of the Indians, provided that small tracts across the river from the Indian

agencies be excepted from the order of restoration (R. 15–16). Pursuant to this advice the President, on August 9, 1879, ordered that some 5,500,000 acres be "restored to the public domain" (R. 14–16). In 1884 the Commissioner concluded that the tracts near the agencies could properly be reopened and by the Executive Order of March 20, 1884, three tracts of about 105,000 acres were "restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement" (R. 17–19).

The Agreement of 1876.—Article 10 of the Fort Laramie treaty obligated the United States to furnish the Sioux subsistence of meal and flour for four years. After the obligation expired in 1873, Congress gratuitously appropriated in each of the years 1874, 1875, and 1876 over a million dollars for the subsistence of the Sioux.[5] The Act of August 15, 1876, c. 289, 19 Stat. 176, 192, however, provided that no further appropriation would be made unless the Sioux—

> shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation

[5] See Act of June 22, 1874, c. 389, 18 Stat. 146, 167; Act of March 3, 1875, c. 132, 18 Stat. 420, 441; Act of August 15, 1876, c. 289, 19 Stat. 176, 192.

> as lies west of the one hundred and third meridian of longitude * * *.

Between September 23 and October 27, 1876, with a full understanding of the condition imposed by the Act of Congress, the various bands of Sioux signed an agreement, which was ratified by the Act of February 28, 1877, 19 Stat. 254 (R. 19). Article 1 thereof fixed a new northern and western boundary "of the reservation defined by article 2" of the treaty of 1868 so as to cede to the United States the territory west of the one hundred and third meridian,[7] and provided futher:

> * * * the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty [of 1868] is hereby abrogated.

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[6] The important area to be surrendered was that part of the permanent reservation west of the one hundred and third meridian, for it embraced territory in the Black Hills in which gold had been discovered.

[7] Some lands west of the Missouri River and north of the original boundary to the reservation (shown on our map as a heavy dotted line) which had been withdrawn from the public domain by the Executive Order of March 16, 1875, were included in the territory added to the reservation by demarcation of the new northern boundary. It is for this reason that, although some 6,100,000 acres were withdrawn from settlement, the restoration orders of 1879 and 1884 include only about 5,600,000 acres. The Sioux ceded, in addition to the territory west of the one hundred and third meridian, a triangular territory between the north and south forks of the Cheyenne River.

This suit.—Under the jurisdictional act of June 3, 1920, c. 222, 41 Stat. 738, the Sioux Tribe filed on May 7, 1923, a petition in the Court of Claims asserting numerous claims against the United States. Subsequently the tribe was permitted to sever the various claims[*] and on May 7, 1934, it filed the separate petition upon which this case arises. The petition alleged that by the Executive Orders of 1875 and 1876 the Sioux became possessed of title in fee to the lands withdrawn (Par. V), and that the orders of 1879 and 1884 constituted a misappropriation of those lands (Par. VI). The petition prayed that just compensation be awarded for such taking (Par. VII).

Upon the foregoing findings of fact the Court of Claims concluded that petitioner had no interest in the lands in question (R. 20) and dismissed the petition (R. 30).

SUMMARY OF ARGUMENT

I

The Constitution vests in Congress power over the public domain and, except as Congress may delegate the power, the executive may not dispose of title to public lands.

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[*] Decisions on some of the other claims have been made as follows: *Sioux Tribe of Indians* v. *United States*, 84 C. Cls. 16 (1936), certiorari denied, 302 U. S. 740; *Id.*, 85 C. Cls. 181 (1937), certiorari denied, 302 U. S. 717; *Id.*, 86 C. Cls. 299 (1938), certiorari denied, 306 U. S. 642; *Id.*, 89 C. Cls. 31 (1939).

A. In *United States* v. *Midwest Oil Co.*, 236 U. S. 459, the Court held that congressional, executive, and judicial practice had so long supported executive orders temporarily setting aside portions of the public domain for public purposes that Congress might fairly be said by its acquiescence to have impliedly delegated such power to the President. Consequently, the four orders here involved undoubtedly were effective to set aside the described lands as "Indian Country" or as an "Indian Reservation," for so long as the orders were unrevoked. But there is a great difference between determining how public lands shall be used from time to time and permanently alienating the beneficial ownership; and the fact that Congress impliedly delegated, and the President exercised, administrative control falls far short of establishing that Congress delegated, or the President ever sought to exercise, power of permanent disposition.

B. In contrast with the situation as to temporary withdrawals involved in the *Midwest Oil* case, the history of executive, congressional, and judicial practice in respect to beneficial ownership of executive order reservations requires the conclusion that Congress has never impliedly delegated its power to make permanent dispositions of the public domain. The President never purported to exercise such power; on the contrary he has always regarded executive order reservations not based on statute or treaty as revocable. Congress never assumed that it had

delegated the power; on the contrary, it several times declared that executive orders creating Indian reservations did not permanently alienate the beneficial ownership or the right to use and occupation. The courts were never squarely faced with the question and expressed various opinions. In short, long continued executive and legislative practice, not denied by the courts, held that the executive could make only temporary dispositions always subject to his control and to the overriding decisions of Congress.

We submit, therefore, that Congress did not delegate power to alienate portions of the public domain and that the President lacked authority to confer upon the Sioux ownership of the lands in question.

II

Read in the background we have delineated, the four executive orders did not attempt to grant ownership to the Sioux but simply set aside the described portion of the public domain for their use until such time as it should be otherwise disposed of. The orders did not contain words of art with an unalterable meaning. See *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116. The recommendations of the Commissioner of Indian Affairs and Secretary of the Interior, upon the basis of which the orders were drawn and executed, show clearly that the sole purpose was to curb the illicit whiskey traffic. It would

have been an extraordinary measure for the President to check this evil by a permanent gift of the beneficial ownership of more than 6,000,000 acres of the public domain when he could accomplish the same purpose by making a temporary withdrawal. The officers charged with the responsibility of administering the orders interpreted them to be temporary. The Commissioner of Indian Affairs in 1875 twice advised settlers that it was not intended to interfere with their existing occupancy and lawful pursuits (R. 10). On one of those occasions he also stated that it was not "supposed that the withdrawal will be made permanent" (R. 10). Subsequent legislation and agreements negotiated with the Sioux show that neither Congress nor the Sioux interpreted the executive orders as granting to the Sioux any rights in the lands in question.

III

In 1876, after three of the executive orders had been issued, the Sioux executed an agreement redefining "the northern and western boundaries of the reservation defined by article 2 of the treaty" of 1868 and relinquishing all claims to "the territory outside said reservation." By this agreement the Sioux released whatever rights they may have acquired under the first three executive orders.

ARGUMENT

Although fee simple title to Indian lands is usually held by the United States, the right of

an Indian tribe to permanent and exclusive use and occupation constitutes beneficial ownership for all practical purposes. *United States* v. *Shoshone Tribe,* 304 U. S. 111, 115–117. If lands so belonging to an Indian tribe are "taken" by the United States, the Indians are entitled to just compensation. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *United States* v. *Klamath Indians,* 304 U. S. 119, 125.

By the Fort Laramie Treaty of 1868 the Sioux relinquished all claim to lands outside the Great Sioux Reservation defined by the treaty, and agreed not to make a permanent home elsewhere (Arts. 2, 11, 16). This agreement bars any claim to beneficial ownership of the lands in question upon the basis of aboriginal use and occupation. Hence, although it quotes at length from the decision in *United States* v. *Santa Fe R. R. Co.,* No. 23, October Term 1941, decided December 8, 1941, we do not understand that petitioner presses the present claim upon such a basis.*

* In *United States* v. *Santa Fe R. R. Co., supra,* the Court held that an Indian tribe might claim beneficial ownership good against a private person upon the basis of ancestral rights resulting from aboriginal use and occupation. No question was involved as to whether a claim good against the United States might be based upon aboriginal use and occupation. The Court of Claims has several times decided that in the absence of treaty recognition or confirmation mere aboriginal possession will not ground a claim for compensation against the United States.

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Indian tribes have beneficial ownership where the United States has granted them the right of permanent use and occupation by statute or treaty. See *e. g., Shoshone Tribe* v. *United States,* 299 U. S. 476. In the present case, however, it is not suggested that any statute or treaty conveyed to the Sioux the lands in question.

Another basis for claiming beneficial ownership which we may also lay aside in the present case as irrelevant, is an executive order establishing an Indian reservation pursuant to a statute or treaty provision. See, *e. g., Donnelly* v. *United States,* 228 U. S. 243; *Spalding* v. *Chandler,* 160 U. S. 394, 402. For the purposes of the present case we need not consider whether the Indian tribes affected by any such executive order held beneficial ownership of this type of executive order reservation. No statute or treaty authorized the President to establish an additional Sioux reservation or to change the boundaries of the treaty reservation. It is true that Article 2 of the Fort Laramie Treaty provided that "no persons * * * shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the

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Duwamish et al. Indians v. *United States,* 79 C. Cls. 530, 597–603, certiorari denied, 295 U. S. 755; *Coos Bay Indian Tribes* v. *United States,* 87 C. Cls. 143, 152–153, certiorari denied, 306 U. S. 653; *The Wichita Indians* v. *United States,* 89 C. Cls. 378, 416.

use of said Indians;" but this provision recognizing that additional lands might be granted did not affect the division of authority within the Government by authorizing the President to take such action. Any additions, of course, would have to be made in accordance with Article IV, Section 3, of the Constitution.

For the foregoing reasons, no doubt, petitioner rests its claim upon the ground that beneficial ownership may be acquired in still another way—by executive order unaided by statute or treaty. Petitioner argues (1) that although the President lacked express statutory or treaty authority, he had implied power to dispose of the lands in question, and that the existence of such power was recognized in *United States* v. *Midwest Oil Co.*, 236 U. S. 459; and (2) that the four executive orders of 1875 and 1876 were intended to, and did, convey to the Sioux beneficial ownership. Thus, there is raised one phase of the general and much discussed question of the status of Indian reservations established by executive order.[10]

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[10] Reference is made to the pertinent authorities in the course of our argument. It is appropriate to point out here, however, that *United States* v. *Santa Fe R. R. Co.*, *supra*, did not involve any question as to what rights were acquired by the Walapai Tribe under the Executive Order of President Arthur, January 4, 1883. The United States was held entitled to an accounting as respects those lands within the reservation to which the Walapai could prove aboriginal use and occupation, and the cause of action was held to depend upon that proof.

In considering the status of executive order reservations we discuss, first, the power of the President to withdraw lands from the public domain for Indian uses, a power sustained in the *Midwest Oil* case and in other cases, and we show that those decisions do not hold that the President had power to grant an irrevocable title to the Indians. Second, we review the history of executive order reservations and show that the executive and legislative branches long regarded executive order reservations as revocable at the will of the President or the Congress, thus establishing that Congress did not impliedly delegate to the President power to alienate any part of the public domain to the Indians. Third, we show that, regardless of the power of the President, the four orders in question, read in the general background of executive practice and in the light of the peculiar circumstances requiring their issuance, did not confer irrevocable rights upon the Sioux. Finally, we point out that after the issuance of three of these orders, Congress and the Sioux agreed that the Sioux should have no claim to lands outside their original reservation, thus affording a practical construction of the executive orders and releasing any rights those orders might have been thought to carry.

I

THE PRESIDENT DID NOT HAVE POWER TO CONVEY TO THE SIOUX THE LANDS IN QUESTION

A. THE POWER OF THE PRESIDENT TO MAKE TEMPORARY WITHDRAWALS FROM THE PUBLIC DOMAIN DID NOT INCLUDE THE POWER TO CONVEY BENEFICIAL OWNERSHIP

Plenary power to dispose of the lands of the United States rests exclusively in Congress. U. S. Const. Art. IV, Sec. 3, cl. 2; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *United States* v. *San Francisco*, 310 U. S. 16, 29. For many years, however, the President made orders without statutory authority setting aside portions of the public domain for particular public purposes and thus closing the lands to settlement. From time to time the Court sustained his action. *E. g. Grisar* v. *McDowell*, 6 Wall. 364; *Wolcott* v. *Des Moines Co.*, 5 Wall. 681. Finally, in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, the Court held that in aid of proposed legislation for conservation the President, by proclamation, could effectively withdraw oil lands in the public domain from all forms of location, settlement or entry. Accord: *Mason* v. *United States*, 260 U. S. 545. The Court broadly sustained the power of the President, even in the absence of express statu-

tory authority, to withdraw lands from settlement and reserve them for particular public uses, such as Indian reservations, military reserves and bird reserves, holding that Congress had impliedly sanctioned the executive's exercise of this authority by uniformly and repeatedly acquiescing in his long continued practice of making such withdrawals.

Prior to the *Midwest Oil* case there had been a number of decisions recognizing that the President could effectively withdraw for Indian purposes portions of the public domain. Thus, it was held that an executive order reservation was "Indian country" within the criminal statutes. *United States* v. *Leathers,* 26 Fed. Cas. 15,581; *United States* v. *Sturgeon,* 27 Fed. Cas. 16,413. Compare *In Re Wilson,* 140 U. S. 575; *United States* v. *Payne,* 8 Fed. 883 (W. D. Ark. 1881). And the Circuit Court of Appeals for the Ninth Circuit twice decided that an executive order was as effective as a treaty to exclude settlers from intrusion, and to forbid the location of mining claims, upon the land which the order set apart as an Indian reservation. *McFadden* v. *Mountain View Min. & Mill. Co.,* 97 Fed. 670 (C. C. A. 9) reversed on other grounds, 180 U. S. 533; *Gibson* v. *Anderson,* 131 Fed. 39 (C. C. A. 9). After the *Midwest Oil* decision Attorney General Stone gave his opinion that executive order reservations were not a part of the "public domain" and so not subject to leasing under the Leasing Act of February 25, 1920 (41 Stat. 437)

34 Op. A. G. 171. *Contra: United States* v. *Harrison,* District Court of the United States for the District of Utah, Equity No. 8288, certified questions dismissed, sub. nom. *United States* v. *McMahon,* 273 U. S. 782.[11]

In view of these decisions, and particularly the decision in the *Midwest Oil* case, it cannot now be doubted that the President had power to create revocable Indian reservations by executive order, until Congress in 1919 forbade the withdrawal of public lands for that purpose except by Act of Congress.[12] Act of June 30, 1919, c. 4, 41 Stat. 3,

[11] Pursuant to the opinion of Attorney General Stone the oil lands in executive order reservations were closed to leasing and in 1926 there were hearings and debates on various bills to provide for leasing such lands. In both the hearings and the debates the status of executive order reservations was earnestly debated. See 67 Cong. Rec. 10913–10921, 11381–11382, 11384, 11387; Hearings on S. 3159 and S. 4152, Senate Committee on Indian Affairs, 69th Cong., 1st Sess., pp. 10–11, 13–14, 15, 18, 25–26, 27–28, 29–31, 33–34, 35, 48, 78–85; Hearings on S. 1722 and S. 3159, Senate Subcommittee on Indian Affairs, 69th Cong., 1st Sess., pp. 52, 62–63, 70–71, 72–77, 80–82, 83, 91–92, 93–94, 97–98, 104–105; Hearings on H. R. 9133, House Subcommittee on Indian Affairs, 69th Cong., 1st Sess., pp. 21, 23–24, 28–29; H. Rep. 763, 69th Cong., 1st Sess.

[12] In 1882 Attorney General Brewster advised that the President had authority to make another reservation for the Sioux (not here involved) by executive order. See 17 Op. A. G. 258. Senator Dawes later spoke of this executive order reservation, which was established for the same reasons as those here involved, as a "mere police regulation" conferring no rights on the Indians. 17 Cong. Rec. 1631. For an earlier opinion denying the power of the President to establish reservations by executive order, see 14 Op. A. G. 181.

34. See also Act of March 3, 1927, c. 299, Sec. 4, 44 Stat. 1347. The lands set aside by executive orders for the use of the Sioux as additions to the permanent treaty reservation were, therefore, lawful reservations during the period in which the executive orders were effective.

But the power of the President temporarily to withdraw portions of the public domain from entry or location for particular public uses cannot be taken as a power in the President permanently to dispose of portions of the public domain and thereby grant beneficial ownership good against the United States. The *Midwest Oil* decision rested upon this very distinction. The opinion emphasized the fact that the executive withdrawals were temporary and subject to disaffirmance. Speaking of the Indian reservations, military reservations, and bird reserves established by executive order, the Court said (236 U. S. at 471):

> But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned. * * * The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; *his action* inflicted no wrong upon any private citizen, and *being subject to disaffirmance by Congress, could occasion no harm to the*

> *interest of the public at large*, Congress did not repudiate the power claimed or the withdrawal orders made. * * * [Italics supplied.]

The *Midwest Oil* case, therefore, does not sustain petitioner's claim of ownership through executive orders, and, for like reasons, the cases sustaining the executive power to withdraw land from the public domain for the use of the Indians, are to be distinguished. This is not to say that Congress could not delegate a power to make permanent disposition. The question whether Congress has made such an additional delegation must, however, be separately investigated. In the next section of this brief, therefore, we turn to the history of executive order reservations to consider whether in fact there was an implied delegation of a power of alienation or whether the executive authority was limited to a power of temporary withdrawal.

B. CONGRESS NEVER DELEGATED TO THE PRESIDENT, AND THE PRESIDENT IN FACT NEVER ATTEMPTED TO EXERCISE, POWER TO GRANT TO INDIAN TRIBES BENEFICIAL OWNERSHIP OF PORTIONS OF THE PUBLIC DOMAIN

The history of the use of executive orders to set aside Indian reservations without express statutory or treaty authority shows affirmatively that the President and Congress distinguished, as we have done, between a withdrawal for Indian use and an irrevocable grant of beneficial ownership, and thus establishes that Congress did not

impliedly delegate to the President any authority to convey ownership of public lands to the Indians.

The practice of withdrawing portions of the public domain for Indian reservations by executive action commenced about 1855, but the orders were relatively infrequent prior to 1871 when the practice of dealing with the Indians by treaty ended. See Cohen, *Handbook of Federal Indian Law* (1941), pp. 14–17, 66. During the following years when the Indians were being settled and resettled on western reservations, the withdrawal of public lands by executive orders occurred so regularly that the Annual Report of the Commissioner of Indian Affairs for 1877 listed (pp. 236–245) "Executive Orders, Establishing, Enlarging or Reducing Indian Reservations, also Restoring Certain Indian Reservations to the Public Domain." Similar compilations appeared in each annual report up to 1887. The President continued to exercise this power until the Act of June 30, 1919, c. 4, Sec. 27, 41 Stat. 3, 34, which provided that the public lands should not be withdrawn for an Indian reservation except by Act of Congress. Finally, the Act of March 3, 1927, c. 299, Sec. 4, 44 Stat. 1347, provided that changes in the boundaries of executive order reservations should not be made except by Act of Congress.

During the period in which executive orders were used to establish or alter reservations approximately 150 executive orders were issued with-

drawing some 150,000,000 acres from the public domain. In some 53 instances the executive department ordered lands that had been previously withdrawn restored to the public domain either to abolish a reservation, to reduce its size, or to make it available to another tribe of Indians. See e. g. Executive Orders Relating to Indian Reservations (1912) vol. 1, pp. 5, 6, 10, 11, 13, 14, 18, 21, 22, 27, 30, 31, 35, 37, 44, 46, 48–50. It has not been possible to calculate the acreage restored. Similarly, Congress has, in several instances, restored to the public domain lands withdrawn by executive order, either directly or by instructions to the President to make the restoration. Acts of July 27, 1868, c. 248, sec. 6, 15 Stat. 198, 223; March 3, 1873, c. 333, 17 Stat. 633; April 15, 1874, c. 96, 18 Stat. 28; March 3, 1875, c. 132, 18 Stat. 420, 445;[11] July 1, 1892, c. 140, 27 Stat. 62; February 20, 1893, c. 147, 27 Stat. 469; May 29, 1908, c. 216, sec. 25, 35 Stat. 444, 457. This long practice of establishing, modifying, and abolishing Indian reservations by executive order was founded on the understanding—shared by the Executive and Congress, and not denied by the courts—that the Indians were mere tenants at will and not the beneficial owners of such reservations.

1. *The Executive.*—During the time it was exercising the power of withdrawing from, and re-

[11] See Executive Orders Relating to Indian Reservations (1912) vol. 1, pp. 111–112.

storing lands to, the public domain, the executive on several occasions stated the effect of the orders of withdrawal. One of the earliest withdrawals was made in 1855 upon recommendation of the Secretary of the Interior that it should be made upon the express condition "that no peculiar or exclusive claim to any land so withdrawn can be acquired by said Indians, for whose future benefit it is understood to be made, until after they shall by future legislation be invested with the legal title thereto". Executive Orders Relating to Indian Reservations (1912) vol. 1, p. 79. Plainly the executive department so construed all such orders for in his annual report for 1872 the Commissioner of Indian Affairs stated (p. 84):

> In addition to the above, 40,000 Indians having no reservations secured to them by treaty have had reservations set apart for them by Executive order out of the public lands of the United States. The number of reservations thus set apart is 15, aggregating 59,544 square miles. *The Indians thus located, however, have, in the nature of the case, no assurance for their occupation of these lands beyond the pleasure of the Executive.* [Italics supplied.]

In his annual report for 1878 the Commissioner summarized the rights of the Indians on various reservations saying (p. 58): "The occupants of reservations created by executive order, or by direction of the Secretary are mere tenants at will,

and possess no permanent rights to the lands upon which they are temporarily permitted to remain." Again, in his annual report for 1880, when discussing railroad rights-of-way through Indian reservations, the Commissioner said (p. 18):

> * * * there is another class of cases [in addition to cases of treaty or statutory reservations] where railroads pass through reserves which have been created by executive order and in which the Indians are mere tenants at will, possessing no permanent right to the lands upon which they are temporarily permitted to remain.

In April, 1885, a Presidential proclamation was signed cancelling an order of February, 1885, which restored certain lands to the public domain because the lands involved had been set aside for the Sioux by the Fort Laramie Treaty and "consequently being treaty reservations the Executive was without lawful power to restore them to the public domain by said Executive Order." Annual Report, Comm'r of Ind. Aff. (1885), pp. 51–52. The Commissioner of Indian Affairs reported that he had steadfastly maintained that those lands belonged to the Sioux as part of the Treaty reservation, an attitude again emphasizing that he distinguished the rights of Indians under treaties from their rights under executive orders.

The next year the Commissioner restated his view that executive orders did not convey title to

the Indians (Annual Report, Comm'r of Ind. Aff. (1886), p. 12):

> The reservation of the Cheyennes and Arapahoes is simply set aside by executive orders and the Indians occupying this tract do not hold it by the same tenure with which Indians in other parts of the Indian Territory possess their reserves.

2. *Congress.*—We have already referred to the fact that Congress several times restored to the public domain lands set aside by executive order as Indian reservations. (See p. 23, *supra.*) By this action Congress clearly showed that it had not authorized the President to grant such lands to the Indians irrevocably. One such restoration was made by the Act of July 1, 1892, c. 140, 27 Stat. 62, which restored to the public domain about 1,500,000 acres of the Colville reservation, established by executive order of President Grant in 1872. In reporting the bill the Senate Committee on Indian Affairs stated (S. Rep. 664, 52d Cong., 1st sess., p. 2):

> This executive order defines the Colville Reservation as it now exists, and is the sole basis upon which the right of occupancy of these Indians rests. Under this order the Indians were given a license to occupy the lands described in it so long as it was the pleasure of the Government that they should do so, and no right, title, or claim to such lands has vested in the Indians by virtue of this occupancy.

It is true that Section 2 of the Act required the proceeds of the sale to be set aside and that Congress ultimately directed them to be paid to the Indians [14] but to draw any inference that Congress thereby recognized the Indians as owners of the land would be contrary to the express words of Section 8 of the Act, which provided:

> That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of said Colville Reservation, whether that hereby restored to the public domain or that still reserved by the Government for their use and occupancy.[15]

The next year, a provision to the same effect was included in the Act of February 20, 1893, Sec. 5, c. 147, 27 Stat. 469, which restored to the public domain a portion of the White Mountain Apache Indian Reservation previously established by a series of executive orders.[16]

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[14] Act of June 21, 1906, c. 3504, 34 Stat. 325, 377.

[15] See Senate debates on the effect of these acts, in 67 Cong. Rec. 721, 10917.

[16] Section 4 of this Act also set aside for the Indians the proceeds of sales of the lands restored after deduction of expenses. And see H. Rep. 763, 69th Cong., 1st Sess., p. 5. See 29 Op. A. G. 239 for a discussion of this Act in which the question of title is mentioned without a definite expression of opinion. However, the practice appears to have been not to make payments for reopening executive order reservations. See Hearings before a Subcommittee of the Committee on Indian Affairs on S. 1722 and S. 3159, 69th Cong., 1st Sess., pp. 104–105.

Section 1 of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, is not, as petitioner asserts (Br. 16–17), inconsistent with this Congressional understanding of the effect of executive orders withdrawing lands from the public domain for Indian purposes. Section 1 provides:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and, he hereby is, authorized * * * to cause said reservation * * * to be surveyed * * * and to allot the lands in said reservation in severalty * * *.

By this section Congress authorized the President to grant lands in executive order reservations to individual Indians in the event that the reservation was allotted in severalty. Congress mentioned executive order reservations only in defining the lands as to which the President should have discretion in making allotments. It did not grant any beneficial interest in unallotted lands to the tribes or recognize the Indians as holding any legal rights in executive order reservations until the lands were allotted. In the present case, moreover, the Allotment Act cannot aid petitioner. The lands in question were restored to the public domain before the Act was enacted. By no stretch of interpretation could the Act be said to

grant to the Indians beneficial ownership of executive order reservations already abolished.

Section 5 of the Act shows affirmatively that Congress believed that the Indian tribes had never had and did not acquire by the Act any title or interest in executive order reservations. Section 5 authorizes the Secretary of the Interior to negotiate for the release of lands not needed for allotment "in conformity with the treaty or statute under which such reservation is held" but makes no mention of executive order reservations. The only reasonable explanation which we can assign for this omission is that Congress believed a release to be unnecessary in the case of executive order reservations because, as the Commissioner for Indian Affairs had repeatedly stated (see pp. 24–26 *supra*), the Indian tribes had no rights in such reservations.

The legislative history of the Allotment Act clearly supports this view. As it passed the Senate the bill (S. 54, 49th Cong., 1st Sess.) contained a preliminary section authorizing the President to issue patents to Indian tribes occupying the reservations created "by virtue of treaty stipulations or an Act of Congress."[17] As Senator Dawes explained, executive order reservations were excluded from this provision because the

[17] This section was stricken from the bill only because it was thought by the House Committee that "the time had passed for the issuance of tribal patents." 18 Cong. Rec. 191, 772, 882.

tribal title did not apply thereto. 17 Cong. Rec. 1630. Throughout the debate Senator Dawes contrasted the public ownership of executive order reservations with the Indian title to statutory and treaty reservations and the Senate accepted the distinction (17 Cong. Rec. 1559, 1631, 1762–1763). He pointed out (17 Cong. Rec. 1630):

> An executive order reservation is public land set apart temporarily for an Indian reservation.

It is true that contrary expressions of opinion can be found. In 1890 Assistant Attorney General Shields advised the Secretary of the Interior that the Indian tribes might have title to executive order reservations. See *C. N. Cotton*, 12 L. D. 205, 206–207. In 1891, in *Re Wilson*, 140 U. S. 575, 577, the Court said that the effect of the Allotment Act "was to confirm the executive order [setting aside the White Mountain Apache Reservation], and establish beyond challenge the Indian title to this reservation." But the statement must be limited to the decision in the case. The petitioner was arguing that by surrendering a part of its jurisdiction of "Indian Country" to the Territory of Arizona, the United States had deprived the district courts of all jurisdiction over crimes committed in "Indian Country" in that Territory. The United States was arguing that the district court retained the unsurrendered jurisdiction over crimes committed in "Indian

Country." Thus, the duration or revocability of the rights of the Indians was not before the Court but only the question of whether this was, as both parties conceived, "Indian Country" while the executive order was outstanding.

Moreover, we have today additional material not available when the opinions noted above were expressed. Shortly after the decision in *Re Wilson*, the Senate Committee on Indian Affairs in its report on the Act of July 1, 1892, restoring part of the Colville Reservation to the public domain, stated the meaning of the Allotment Act as applied to executive order reservations (S. Rep. 664, 52d Cong., 1st Sess., p. 2):[18]

> An erroneous idea seems to have grown up, that the Indian allotment act and its amendments have given additional sanctions to executive reservations, and operated to confer titles upon the Indians occupying them they did not before possess. * * * At the time of the enactment of this statute, there were fifty-six executive reserva-

[18] Of the nine members of this committee, six—Senators Dawes, Plant, Stockbridge, Morgan, Jones, and Daniel—had been on the committee when the General Allotment Act was passed and Senators Dawes and Jones had been members of the Senate conference committee on the 1887 Act. See 18 Cong. Rec., pt. 1, p. 478; Congressional Directory, 1887–1889, p. 116; *Id.*, 1891–1892, p. 116. Senator Dawes was probably the most prominent legislator of this period upon Indian Affairs and the General Allotment Act is generally known as the "Dawes Allotment Act." Kinney, *A Continent Lost—A Civilization Won* (1937), p. 198.

tions, embracing perhaps from 75,000,000 to 100,000,000 acres of the public lands, in which the Indians had no right or claim of title and which could be extinguished by act of the President. It would be preposterous to place such a construction upon the language of this act as would divest the United States of its title to these lands. * * *[19]

3. *The Courts.*—In the period in which executive orders setting aside Indian reservations were being issued there were few occasions on which the courts were required to consider the status of such reservations. Occasionally the authority of the President to withdraw lands from the public domain was recognized in decisions holding that the lands became "Indian country" closed to settlement and location. See cases cited pp. 17–18, *supra.* Twice, this Court expressed the opinion that the Indian tribes had "title" to the lands set aside by executive order. The first occasion was in *Re Wilson,* a decision which we have already dis-

[19] Petitioner is not aided by Section 27 of the Indian Appropriation Act of June 30, 1919, c. 4, 41 Stat. 3, 34. That Section provided: "That hereafter no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress."

Petitioner argues (Br. 17) that the enactment of this Section amounts to a recognition of the prior practice of establishing Indian reservations by executive order. Of course, there is no doubt of Congressional recognition of the practice but the argument overlooks the distinction between withdrawal of land from the public domain and divestiture of the Government's beneficial ownership and title.

cussed. (See pp. 30–31, *supra*.) Later, in *Spalding* v. *Chandler*, 160 U. S. 394, 403, it was said that when reservations were created, the Indians acquired the "same character of title," whether the reservation was created by treaty or executive order; but the issue was whether an executive order duly authorized to carry out a treaty was effective to close the lands to settlement.[20] On each occasion, therefore, the Court was speaking only of the right of the Indians while the executive orders were in force and on neither occasion did the Court have before it any question as to the duration of the Indians' rights in executive order reservations.[20a]

While the inferior courts recognized the effectiveness of executive orders to establish reservations, they pointed out that such orders did not

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[20] These opinions have not been thought to foreclose the question of title to executive order reservations. See 34 Op. A. G. 171, 176.

[20a] It is significant in this connection that in *Spalding* v. *Chandler*, *supra*, Mr. Justice White spoke of the rights of the Indians in lands which they originally occupied as a "title and right to the perpetual occupancy of the land" as contrasted with a fee and then, in speaking of reservations created by treaty or executive order, said that the Indians held by "the same character of title, to wit, the right to possess and occupy," without mentioning the duration of the "title." 160 U. S. 402–403. The fact that the Court in this case was not considering whether the Indians had any irrevocable rights is emphasized later in the opinion where it is said "Private rights could not, without the authority of Congress, be acquired in the tract during the occupancy of the reservation under the treaty." 160 U. S. 404–405.

grant rights as against the United States. For example, in *United States* v. *Payne*, 8 Fed. 883 (W. D. Ark. 1881), the court said that even in creating reservations by treaty the Indians were not always granted ownership (p. 888):

> The sovereign is not parting with the title, but only setting it [the reservation] apart to be used for a specific public purpose. * * *

And in *United States* v. *Ashton*, 170 Fed. 509 (C. C. W. D. Wash. 1909), appeal dismissed 220 U. S. 604, it was said (p. 519):

> * * * the executive orders making a reservation of public land for use of the Indians were not irrevocable, nor in any sense a grant of title.[21]

The executive and Congressional understanding of the effect of executive orders creating reservations shows that Congress did not by implication delegate to the President its otherwise exclusive power to alienate portions of the public domain. The court decisions do not deny this conclusion. Such implied delegation could be spelled out only by executive assertion of the power and Congressional acquiescence. Cf. *United States* v. *Midwest Oil Co., supra.* The history which we have re-

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[21] The Court of Claims took a similar view in *Medawakanton Indians* v. *United States*, 57 C. Cls. 357 (1922). Speaking of Indians settled by President Grant on an executive order reservation (p. 368), the Court found as a fact that (p. 370)—

"They were occupying the reservation at Niobrara, subject to the will of the President * * *."

viewed shows that the President never sought or intended to exercise such power but, on the contrary, that he believed reservations established by executive order to be subject to alteration or revocation. Congress, taking the same view both implicitly and explicitly, itself reopened executive order reservations to settlement. What is most important, during the years in which Indians were being settled on executive order reservations, the executive branch repeatedly advised Congress through the reports of the Commissioner of Indian Affairs that the executive orders granted only the use of the lands subject to the will of the President. The limitation was a realistic one in the administration of the public domain for it was one thing for the President to use land for particular public purposes always subject to disaffirmance by Congress or himself and quite another, to create adverse interests. (See pp. 20–21, *supra*.) Congressional acquiescence and any implied delegation of power must, therefore, have been limited to the power of making withdrawals for public purposes and subject to change or revocation. The President had no power to convey to the Sioux beneficial ownership of the lands in question.

II

THE EXECUTIVE ORDERS OF 1875 AND 1876 DID NOT PURPORT TO GRANT BENEFICIAL OWNERSHIP TO THE SIOUX

We have shown that the President and the executive officers responsible for Indian affairs

regarded executive orders not as grants, but as temporary measures subject to revocation or alteration. We urge that this was the consistent executive practice and that Congress knew and accepted it, and did not delegate to the President, or recognize that he had, any greater authority. But even if we view the case most favorably to petitioner and assume an implied delegation of power to the President, nevertheless the executive and congressional practice shows at the very least that executive orders creating reservations were not *uniformly* intended to grant title to the Indians. To illustrate, surely it cannot be said that President Grant considered that he was granting Indian tribes beneficial ownership in every reservation that he established by executive order while at the same time his Commissioner for Indian Affairs was declaring that such orders gave no rights to the Indians save that of occupancy at the will of the Government. (See pp. 24–26, *supra*.) Consequently, if we assumed for purposes of argument that the President had power to grant ownership, it would then become a question in each instance whether the order belonged in the class of orders granting title or in the class simply withdrawing the land from settlement. Considered against the background of executive practice, there can be little doubt that the four orders here in question were temporary withdrawals.

The orders directed that the lands be "withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation" (R. 9, 11, 12, 14). There is no compulsion to read these words as conveying beneficial ownership. Petitioner relies on the word "use" but agrees, as it must, that the word is not to be regarded in a technical sense (Br. 21). It must be read "having regard to the purpose of the arrangement made." *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116.

As the findings make plain, the President's purpose in setting the lands aside for the "use" of the Sioux was to make the lands along the east bank of the Missouri River part of the "Indian Country" in order to protect the inhabitants of the adjoining reservation from liquor sellers (see pp. 5–6 *supra*). It made little difference to the accomplishment of the purpose whether the lands were added to the Sioux or some other reservation and, in fact, the recommendation upon which the second order was based suggested merely that the remaining points of access along the Missouri River, not theretofore embraced in any Indian or military reservation, be added to some reservation (R. 46–47). Accordingly, as the Court of Claims found, when these lands "were no longer needed for the purpose for which they had been withdrawn from sale," they were restored to the pub-

lic domain by the orders of 1879 and 1884 (R. 19; see also R. 18).[22]

Petitioner, without challenging the court's findings or complaining of the failure to make additional findings,[23] seemingly contends (Br. 2, 20–24) that the Executive Orders were issued not only to suppress the liquor traffic but also to augment the treaty reservation in order to protect members of the tribe occupying the 6,000,000 acres withdrawn. There is no warrant for the assertion. The evidence excerpted by petitioner from the rec-

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[22] Petitioner's contention that the administrative authorities misconstrued the law prohibiting sale of liquor to the Indians (R. 24–26) is immaterial. The record shows that the law did not enable him to deal effectively with the liquor traffic when the lands were withdrawn from settlement (R. 14–19) and that he assented to their reopening because he believed there had been a change in the applicable statutes (R. 55–59). Moreover, the administrative construction of the Revised Statutes, which was thought to require the addition of these lands to the "Indian country" in order to deal with the liquor problem, was based upon court decisions and led the Commissioner to "strongly recommend" a change in the law. Annual Report, Commissioner of Indian Affairs, 1876, p. xxiv. And Congress made such change by the Act of February 27, 1877, c. 69, 19 Stat. 240, 244.

[23] Since petitioner does not specify as error the failure to make additional findings nor complain of the findings made (Br. 10–12), it has not brought itself within the Act of May 22, 1939, c. 140, 53 Stat. 752, giving this Court, in cases from the Court of Claims, authority to review "errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

ord (R. 32–34) at most indicates that some members of the Yanktonai band were occupying a few patches of bottom land along the east bank of the Missouri River in violation of the Fort Laramie treaty. There is nothing to show that either the Commissioner of Indian Affairs or the Secretary of the Interior or the President had the Yanktonai band in mind when the executive orders were issued and it cannot be assumed that they were moved by any other purpose than that which is set forth in the recommendations upon which the orders were issued.

Consistently with the limited purpose to make the lands "Indian country" to the extent necessary to check the liquor traffic, the officers charged with the responsibility of administering the executive orders interpreted them to be temporary. The Commissioner of Indian Affairs in 1875 twice advised settlers within the territory embraced by the initial order that it was not intended to interfere with their existing occupancy and their lawful pursuits (R. 10). On one occasion he stated (R. 10):

> This order does not affect existing rights of any persons, residents within the limits of the Territory withdrawn, *nor is it supposed that the withdrawal will be made permanent.* [Italics supplied.]

Later, upon directions from the Secretary of the Interior, he instructed the agents to restrain the Indians from molesting settlers on lands covered by the order (R. 10). These steps are inconsistent

with a purpose to grant the lands to the Indians. The practical contemporary construction which they evidence is highly persuasive of the meaning of the orders. Cf. *United States* v. *Eaton*, 169 U. S. 331, 343.

Four subsequent events confirm this interpretation. First, in the Indian Appropriation Act of 1876, c. 289, 19 Stat. 176, 192, Congress declared that it would make no further gifts to the Sioux unless the Sioux would relinquish part of their reservation and also "all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of" 1868. In September and October of 1876 the Sioux made such an agreement. In November 1876, while this agreement was awaiting ratification by Congress, the fourth executive order was issued. It is impossible to ascribe to the President an intention to grant to the Sioux ownership of a portion of the public domain at the very time when Congress was requiring the Sioux to release every claim to lands outside the original reservation. Nor can the Sioux be supposed to have had a different understanding of these contemporary transactions.

Second, in 1882 the Sioux negotiated an agreement with Commissioners sent out by the Secretary of the Interior, which, if it had been approved by Congress, would have made a new disposition of the entire reservation. At that time part of the lands withdrawn by the executive

orders had not been restored to the public domain. Nevertheless, the agreement provided (H. Ex. Doc. 68, 47th Cong., 2d Sess., pp. 6–7):

> The said Indians do hereby relinquish and cede to the United States all of the Great Sioux Reservation—as reserved to them by the treaty of 1868, and modified by the agreement of 1876—not herein specifically reserved and set apart as separate reservations for them.

This description is plain proof that neither the Sioux nor the Commissioners supposed that the Great Sioux Reservation included the lands set aside by executive order.

Third, in 1888 a new commission was sent out to secure an agreement like the agreement negotiated in 1882. The Commission took with it a map of the Sioux reservation which showed the lands that the Government believed were part of the reservation; the lands covered by the executive orders were not included. S. Ex. Doc. 17, 50th Cong., 2d Sess., pp. 5, 295. The Sioux rejected the agreement. They also disputed the accuracy of the map claiming that it did not show all the lands belonging in the reservation. But they laid no claim to the lands covered by the executive orders; on the contrary, they pointed to the lands on the east bank of the Missouri as open for the white men to settle.—*Id.* at 5, 6, 25, 31, 61, 67, 78, 79, 99, 100.

Fourth, in 1889 when Congress passed the Act of March 2, 1889, c. 405, 25 Stat. 888, reducing the size of the reservation it spoke of persons who had entered upon—

> any part of the Great Sioux Reservation lying east of the Missouri River and known as the Crow Creek and Winnebago Reservation * * *.

Thus Congress indicated again that it believed that no other lands east of the river were a part of the Sioux reservation.

These four events taken together render indisputable our construction of the executive orders for they show that neither the President nor the Congress nor the Sioux themselves believed that the orders conveyed any rights to the Sioux in the lands in question.

III

BY THE AGREEMENT OF 1876 THE SIOUX RELEASED ANY RIGHTS THEY MIGHT HAVE HAD IN THE LANDS COVERED BY THE FIRST THREE EXECUTIVE ORDERS

The Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176, 192, provided that no future appropriation should be made for the subsistence of the Sioux—

> unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so

> much of their said permanent reservation as lies west of the one hundred and third meridian of longitude. * * *

The agreement negotiated with the Sioux and ratified by the Act of February 28, 1877, c. 72, 19 Stat. 254, carried out these conditions. Article 1 of the agreement redefined "the northern and western boundaries of the reservation defined by article 2 of the treaty" of 1868 so as to release the specified portion of the reservation and so as to grant to the Sioux additional land to the north of the reservation.[24] In the remaining portion of Article 1 the Sioux relinquished to the United States "all the territory outside the said reservation, as herein modified and described."

This agreement constituted a release barring any claim by petitioner to the lands covered by the three executive orders issued before its execution.[25]

A. *The release included any rights petitioner might have in the lands here involved.*—In the court below petitioner argued that the lands included in the executive orders had been added to the reservation pursuant to the Treaty of 1868, that they were a part of "said reservation" within the meaning of that term in Article 1 of the 1876 agreement, and, consequently, were not relin-

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[24] See pp. 7–8, *supra*.

[25] The agreement of 1876 was executed by the Sioux in September and October of 1876, 19 Stat. 257–263 (R. 19). The fourth executive order was signed on November 28, 1876 (R. 13).

quished by that agreement. But this contention ignores the fact that the words "said reservation" refer to the preceding language of Article 1 of the agreement which speaks of the "reservation defined by article 2 of the treaty" of 1868. The correctness of this construction is evident when it is recalled that the 1876 Act required the Sioux to relinquish their rights to any country "outside the boundaries of the permanent reservation established by the treaty." The reservation "established" by the treaty obviously did not include the lands covered by the executive orders, even though the treaty recognized that additions to the reservation might be made. It follows that any rights of the Sioux to these lands were released by the 1876 agreement.

B. *The Agreement of 1876 was valid.*—Article 12 of the Fort Laramie Treaty of 1868 provided:

> No treaty for the cession of any portion or part of the reservation herein described * * * shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; * * *

In reliance upon this article, petitioner may argue, as it asserted in the *Black Hills* case in the Court of Claims,[28] that the 1876 agreement was invalid

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[28] Another suit filed by petitioner in the Court of Claims, and not yet decided, seeks to recover for an alleged taking of the Black Hills country (the part of the reservation lying

because it was signed by the chiefs and headmen of the various bands of Sioux Indians and not by three-fourths of the adult male Indians.[27] To this contention there are several answers.

1. The question of whether the 1876 agreement was executed in such manner as to bind the Sioux was one for Congress and not for the courts. As guardian of the Indians, the United States has plenary power to control for their benefit the property and affairs of the Indian tribes. And the manner in which Congress chooses to exercise its power as guardian is not subject to review by the courts. *Klamath Indians* v. *United States,*

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between the one hundred and third and one hundred and fourth meridians) on the ground that the agreement of 1876, by which that country was ceded to the United States, was invalid. In the instant case, petitioner did not contend in the court below that the release was invalid but rather that its validity could not be determined because that precise issue was being litigated in the *Black Hills* case. That fact obviously does not prevent the Government from contending in this case that the agreement is a valid defense to petitioner's claim.

[27] Petitioner also argued in the *Black Hills* case that the agreement was invalid because it was misinterpreted to the Indians and was obtained by misrepresentations. The finding in the instant case that the Indians signed with a full understanding of the conditions of the 1876 Act (R. 19–20) precludes such argument here. And see Sen. Doc. 9, 44th Cong., 2d sess. containing the reports of the Commission which negotiated the agreement. Moreover, the courts do not inquire into the circumstances of the making of such an agreement after it has been approved by Congress. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, discussed *infra*, p. 46.

296 U. S. 244, 252–253, 254–255; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 567–568; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306–308; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *Chippewa Indians* v. *United States*, 88 C. Cls. 1, 32, affirmed, 307 U. S. 1. Cf. *Seminole Nation* v. *United States*, 92 C. Cls. 210, certiorari denied, 313 U. S. 563; *Creek Nation* v. *United States*, 92 C. Cls. 269, certiorari denied, 313 U. S. 581. Specifically, the question of whether an agreement ceding Indian land is valid notwithstanding that three-fourths of the adult male Indians have not consented to the cession as required by a previous treaty is "solely within the domain of the legislative authority and its action is conclusive upon the courts." *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568. In the present case, Congress approved and ratified the agreement upon a finding that the Indians who signed it were authorized to act for the tribe. 19 Stat. 254.

2. By Article 5 of the 1876 agreement (see 19 Stat. 254, 256), the United States agreed to furnish rations and other articles to the members of the tribe. Pursuant to this promise, the Government has expended some $37,000,000.[28] Having accepted these benefits over a long period, the Sioux cannot now in good conscience attack as void or ineffec-

[28] A series of acts extending over fifty years which, in most cases, appropriated moneys "as per the agreement" of 1876 are listed in Appendix E, *infra*, p. 60.

tive the terms of the agreement under which they were paid.

3. Section 19 of the Act of March 2, 1889, c. 405, 25 Stat. 888, 896, declared that all the provisions of the 1876 agreement "are hereby continued in force." Section 28 provided that the act should take effect when accepted by the Indians in the manner and form required by Article 12 of the 1868 treaty. On February 10, 1890, the President issued a proclamation declaring that the Indians had accepted the act. 26 Stat. 1554. The acceptance of Section 19 by three-fourths of the adult male Indians constituted a re-execution of the 1876 agreement. It is therefore immaterial whether in 1876 the agreement was signed by the requisite number of Indians.

CONCLUSION

It is respectfully submitted that, for the reasons stated, the judgment of the Court of Claims dismissing the petition should be affirmed.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
VERNON L. WILKINSON,
JOHN F. COTTER,
ROGER P. MARQUIS,
ARCHIBALD COX,
Attorneys.

APRIL 1942.

APPENDIX A

The material portions of the Treaty of April 29, 1868, ratified February 16, 1869, 15 Stat. 635, are as follows:

ARTICLE II. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge

of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

ARTICLE XI. In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase.

ARTICLE XII. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI of this treaty.

ARTICLE XV. The Indians herein named agree that when the agency house and other

buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI hereof.

ARTICLE XVI. The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same; and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

APPENDIX B

Executive Orders withdrawing the lands from the public domain are as follows:

January 11, 1875:

> It is hereby ordered that the tract of country in the Territory of Dakota lying within the following described boundaries, viz: Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

March 16, 1875:

> It is hereby ordered that the tract of country in the Territory of Dakota lying within the following described boundaries, viz, commencing at a point where the one hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River, opposite the mouth of said

Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

May 20, 1875:

It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east, be, and the same hereby is, withdrawn from sale and settlement and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

November 28, 1876:

It is hereby ordered that the tract of Country in the Territory of Dakota on the east side of the Missouri River, lying within the following boundaries, viz: Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct line to the east corner of the Fort Rice Military Reservation; thence in a southwestern direction along the said military reserva-

tion to the east bank of the Missouri River; thence with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

APPENDIX C

The Executive Orders restoring the lands to the public domain are as follows:

August 9, 1879:

> It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reservation; thence northeasterly along said boundary line to the southeast corner

of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by the Executive Order of March 6, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is intersected by the one-hundredth degree of west longitude; thence south with said one-hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the

middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain.

March 20, 1884:

It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement.

APPENDIX D

Act of August 15, 1876, c. 289, 19 Stat. 176, 192:

For this amount, for subsistence, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided,* That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right-of-way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for, and provided for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision: *And provided also,* That

no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting: *Provided further,* That the Secretary of the Interior may use of the foregoing amounts the sum of twenty-five thousand dollars for the removal of the Poncas to the Indian Territory, and providing them a home therein, with the consent of said band.

The material portions of the Agreement of 1876, ratified by the Act of February 28, 1877, ch. 72, 19 Stat. 254:

ARTICLE 1. The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence

down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

ARTICLE 2. The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

ARTICLE 3. The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity of the Missouri River, as the President of the United States shall designate.

APPENDIX E

Acts Appropriating Subsistence for Sioux pursuant to Agreement of 1876:

March 3, 1877, c. 101, 19 Stat. 271, 287	$1,125,000.00
May 27, 1878, c. 142, 20 Stat. 63, 80	1,125,000.00
February 17, 1879, c. 87, 20 Stat. 295, 310	1,005,000.00
May 11, 1880, c. 85, 21 Stat. 114, 127	1,000,000.00
March 3, 1881, c. 137, 21 Stat. 483, 491	1,000,000.00
May 17, 1882, c. 163, 22 Stat. 68, 80	1,075,000.00
March 1, 1883, c. 61, 22 Stat. 433, 444	1,375,000.00
July 4, 1884, c. 180, 23 Stat. 76, 87	1,225,000.00
March 3, 1885, c. 341, 23 Stat. 362, 375	1,250,000.00
May 15, 1886, c. 333, 24 Stat. 29, 39	1,200,000.00
March 2, 1887, c. 320, 24 Stat. 449, 459	1,000,000.00
June 29, 1888, c. 503, 25 Stat. 217, 228	1,000,000.00
March 2, 1889, c. 412, 25 Stat. 980, 992	900,000.00
August 19, 1890, c. 807, 26 Stat. 336, 348	950,000.00
March 3, 1891, c. 543, 26 Stat. 989, 1002	1,100,000.00
July 13, 1892, c. 164, 27 Stat. 120, 132	1,225,000.00
March 3, 1893, c. 209, 27 Stat. 612, 624	1,150,000.00
August 15, 1894, c. 290, 28 Stat. 286, 300	1,000,000.00
March 2, 1895, c. 188, 28 Stat. 876, 888	1,000,000.00
June 10, 1896, c. 398, 29 Stat. 321, 333	1,000,000.00
June 7, 1897, c. 3, 30 Stat. 62, 74	900,000.00
July 1, 1898, c. 545, 30 Stat. 571, 582	900,000.00
March 1, 1899, c. 324, 30 Stat. 924, 935	900,000.00
May 31, 1900, c. 598, 31 Stat. 221, 232	900,000.00
March 3, 1901, c. 832, 31 Stat. 1058, 1069	900,000.00
May 27, 1902, c. 888, 32 Stat. 245, 254	850,000.00
March 3, 1903, c. 994, 32 Stat. 982, 990	850,000.00
April 21, 1904, c. 1402, 33 Stat. 189, 199	850,000.00
March 3, 1905, c. 1479, 33 Stat. 1048, 1055	700,000.00
June 21, 1906, c. 3504, 34 Stat. 325, 371	600,000.00
March 1, 1907, c. 2285, 34 Stat. 1015, 1048	877,500.00
April 30, 1908, c. 153, 35 Stat. 70, 94	500,000.00
March 3, 1909, c. 263, 35 Stat. 781, 810	500,000.00
April 4, 1910, c. 140, 36 Stat. 269, 283	350,000.00
March 3, 1911, c. 210, 36 Stat. 1058, 1072	350,000.00
August 14, 1912, c. 388, 37 Stat. 518, 536	350,000.00
June 30, 1913, c. 4, 38 Stat. 77, 95	200,000.00
August 1, 1914, c. 222, 38 Stat. 582, 603	200,000.00

May 18, 1916, c. 125, 39 Stat. 123, 151	$200,000.00
March 2, 1917, c. 146, 39 Stat. 969, 987	200,000.00
May 25, 1918, c. 86, 40 Stat. 561, 585	200,000.00
June 30, 1919, c. 4, 41 Stat. 3, 26	200,000.00
February 14, 1920, c. 75, 41 Stat. 408, 429	193,000.00
March 3, 1921, c. 119, 41 Stat. 1225, 1244	273,000.00
May 24, 1922, c. 199, 42 Stat. 552, 577	273,000.00
January 24, 1923, c. 42, 42 Stat. 1174, 1198	273,000.00
June 5, 1924, c. 264, 43 Stat. 390, 410	258,000.00
March 3, 1925, c. 462, 43 Stat. 1141, 1160	229,574.00
May 10, 1926, c. 277, 44 Stat. 453, 473	214,574.00
January 12, 1927, c. 27, 44 Stat. 934, 953	214,574.00

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 798.—October Term, 1941.

The Sioux Tribe of Indians, Petitioner, vs. The United States. } On Writ of Certiorari to the United States Court of Claims.

[May 11, 1942.]

Mr. Justice Byrnes delivered the opinion of the Court.

This is an action to recover compensation for some 5½ million acres of land allegedly taken from the petitioner tribe in 1879 and 1884. The suit was initiated under the Act of June 3, 1920 (41 Stat. 738) permitting petitioner to submit to the Court of Claims any claims arising from the asserted failure of the United States to pay money or property due, without regard to lapse of time or statutes of limitation. The Court of Claims denied recovery (— F. Supp. —), and we brought the case here on certiorari (— U. S. —).

The facts as found by the Court of Claims are as follows:

In 1868 the United States and the Sioux Tribe entered into the Fort Laramie Treaty (15 Stat. 635). By Article II of this treaty a certain described territory, known as the Great Sioux Reservation and located in what is now South Dakota and Nebraska, was "set apart for the absolute and undisputed use and occupation" of the Tribe. The United States promised that no persons, other than government officers and agents discharging their official duties, would be permitted "to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians." For their part, the Indians relinquished "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid." No question arises in this case with respect to the lands specifically included within the Reservation by this treaty.

The eastern boundary of the Great Sioux Reservation, as constituted by the Ft. Laramie Treaty, was the low water mark on

the east bank of the Missouri River.[1] The large tract bordering upon and extending eastward from the east bank of the river remained a part of the public domain open to settlement and afforded easy access to the Reservation. As a result great numbers of white men "infested" the region for the purpose of engaging in the liquor traffic. Anxiety over this development led the Commissioner of Indian Affairs on January 8, 1875 to suggest to the Secretary of the Interior that he request the President to issue an executive order withdrawing from sale and setting apart for Indian purposes a certain large tract of the land along the eastern bank of the Missouri River. In the Commissioner's letter to the Secretary of the Interior, and in the latter's letter of January 9th to the President, the reason advanced for the proposed executive order was that it was "deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri River." On January 11, 1875, the President signed the suggested order. It described the territory affected and provided that it "be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation." On two occasions thereafter, once in February and again in May, white persons who had settled on the land in question prior to the issuance of the executive order and who feared that its effect was to deprive them of their holdings, were informed by the Commissioner of Indian Affairs that the object of the executive order was "to enable the suppression of the liquor traffic with the Indians on the Missouri River," that it did not affect the existing rights of any persons in the area, that it was not "supposed that the withdrawal will be made permanent," and that no interference with the peaceful occupancy of the territory had been intended.

On March 13, 1875, the Commissioner of Indian Affairs addressed another letter to the Secretary of the Interior. In it he recommended that the Secretary request the President to withdraw from sale and set apart for Indian purposes another tract of land bordering the Great Sioux Reservation, this time to the north and northeast. The reason given was similar to that for which the first order had been sought: "viz: the suppression of

[1] The Great Sioux Reservation also included two small theretofore existing reservations located on the east bank of the river. They are of no consequence so far as the present dispute is concerned.

the liquor traffic with Indians at the Standing Rock Agency". As a "further reason for said request" the Commissioner stated that "the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by [the Fort Laramie] treaty . . . but are included in the tract proposed to be withdrawn." The Secretary forwarded the Commissioner's report to the President with his concurrence, repeating that the "enlargement of the Sioux reservation in Dakota" was "deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency." On March 16, 1875 the President issued a second executive order describing the tract of land involved and declaring that it "be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation in said Territory."

In mid-May of 1875 the Secretary of War transmitted to the Secretary of the Interior a letter from the officer in command of the Southern District of the Military Department of Dakota in which it was pointed out that a small tract of land along the eastern bank of the Missouri River opposite the southern corner of the Sioux Reservation was still open to settlement and afforded "a very nice point for whiskey sellers and horse thieves". Upon the basis of this letter, the Commissioner recommended to the Secretary of the Interior and the Secretary recommended to the President the issuance of still a third executive order withdrawing the described tract from settlement. On May 20, 1875 the executive order was issued in the same form as its two predecessors.

Finally upon a similar complaint from the Acting Agent of the Standing Rock Agency that a small piece of land to the north of the reservation was being used as a base of operations by persons selling liquor and ammunition to the Sioux Indians, the Commissioner of Indian Affairs and the Secretary of the Interior recommended a further order to "effectually cut off these whiskey dealers". In his letter to the Secretary dated November 24, 1876, the Commissioner stated: "It is not proposed to interfere with the vested rights, or the legitimate business of any settler who may be upon this tract." The President issued a fourth executive order in the usual form on November 28, 1876. On December 13, 1876 the Commissioner notified the agent at Standing Rock that

the order had been issued, and added that it was "not intended to interfere with the vested rights of any settler upon the tract or with the legitimate business pursuits of any person lawfully residing within its limits."

About two and a half years after the last of these four executive orders withdrawing lands from sale and setting them apart for the use of the Sioux, the Commissioner of Indian Affairs submitted to the Secretary of the Interior a report upon a suggestion that the orders be modified so as to permit the return of the lands to the public domain. The report, dated June 6, 1879, reviewed the problems arising from the liquor trade during the years following the Fort Laramie treaty, recalled that the purpose of the four executive orders of 1875 and 1876 had been to eliminate this traffic, observed that they had "to a great extent accomplished the object desired, viz: the prevention of the sale of whiskey to the Indians", and concluded that any change in the boundaries established by the executive orders would "give renewed life to this unlawful traffic, and be detrimental to the best interests of the Indians".

Three weeks later, however, upon reconsideration, the Commissioner informed the Secretary that in his opinion the lands included in the executive orders of 1875 and 1876 might be "restored to the public domain, and the interests of the Indians still be protected." In explanation he stated:

"These lands were set apart for the purpose, as alleged, of preventing illegal liquor traffic with the Indians. At the time, said lands were set apart there was no law providing a punishment for the sale of liquor to Indians, 'except to Indians in the Indian country', but, by the Act of February 27, 1877, (19 Stat. 244) persons who now engage in liquor traffic with Indians, no matter in what locality, are liable to a penalty of $300, and two years imprisonment, and, therefore, the necessity for so large a reservation for the protection of these Indians, in this repsect [*sic*] does not now exist."[2]

Accordingly, he recommended that the lands withdrawn from sale by the President in 1875 and 1876 be returned to the public domain with the exception of three small tracts directly opposite the Cheyenne, Grand River, and Standing Rock agencies. On August 9, 1879 an executive order to this effect was promulgated and the land with the exceptions indicated was "restored to the public

[2] Letter from Commissioner to Secretary of the Interior, dated June 27, 1879.

domain". Five years later the Commissioner informed the Secretary that the Grand River Agency had ceased to exist and that the agents at Cheyenne and Standing Rock considered it no longer necessary to withhold the tracts opposite their agencies from the public domain "for the purpose for which they have thus far been retained." Consequently, an executive order was prepared and signed by the President on March 20, 1884, restoring these three small pieces of land to the public domain, "the same being no longer needed for the purpose for which they were withdrawn from sale and settlement."

One additional event remains to be noted. In the Indian Appropriation Act for 1877, approved August 15, 1876, (19 Stat. 176, 192), Congress provided:

" . . . . hereafter there shall be no appropriation made for the subsistence of said Indians [i.e., the Sioux], unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight [the Fort Laramie treaty] for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude [the western boundary set by the Fort Laramie treaty had been the 104th meridian], and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River . . . ."

On September 26, 1876—a date subsequent to the first three of the four executive orders setting apart additional lands for the use of the Sioux, but about two months prior to the last of those orders—the Sioux Tribe signed an agreement conforming to the conditions imposed by Congress in the Indian Appropriation Act and promised to "relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described . . . ."[3]

Petitioner's position is that the executive orders of 1875 and 1876 were effective to convey to the Tribe the same kind of interest in the lands affected as it had acquired in the lands covered by the Fort Laramie Treaty, that the executive orders of 1879 and 1884 restoring the lands to the public domain deprived petitioner of this interest, and that it is entitled to be compensated for the fair value of the lands as of 1879 and 1884. The government

[3] This treaty was ratified by the Act of February 28, 1877 (19 Stat. 254).

defends on several grounds: *first*, that in general the President lacked authority to confer upon any individual or group a compensable interest in any part of the public domain; *second*, that even if he had the power to convey such a compensable interest, the President did not purport to do so in this case; and *third*, that in any event by the treaty of 1876 the Sioux relinquished whatever rights they may have had in the lands covered by the first three of the four executive orders.

Section 3 of Article IV of the Constitution confers upon Congress exclusively "the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Nevertheless, "from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses." *Grisar* v. *McDowell*, 6 Wall. 363, 381. As long ago as 1830 Congress revealed its awareness of this practice and acquiesced in it.[4] By 1855 the President had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations.[5] From that date until 1919,[6] hundreds of reservations for Indian occupancy and for other purposes were created by executive order. Department of the Interior, *Executive Orders Relating to Indian Reservations, passim*; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469-470. Although the validity of these orders was occasionally questioned,[7] doubts were quieted in *United States* v. *Midwest Oil Co., supra.* In that case it was squarely held that even in the absence of express statutory authorization, it lay within the power of the President to withdraw lands from the public domain. Cf. *Mason* v. *United States*, 260 U. S. 545.

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[4] The Pre-emption Act of May 29, 1830, excluded from its provisions "any land which is reserved from sale by Act of Congress, or by order of the President." 4 Stat. 420, 421. "Lands included in any reservation by any treaty, law, or proclamation of the President" were excluded from the operation of the Pre-emption Act of September 4, 1841. 5 Stat. 453, 456.

[5] Cohen, *Handbook of Federal Indian Law* (1941) 299; Department of the Interior, Executive Orders Relating to Indian Reservations, Vol. I, p. 79.

[6] By § 27 of the Act of June 30, 1919, Congress declared that thereafter "no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by Act of Congress." 41 Stat. 3, 34. In 1927 Congress added a provision that any future changes in the boundaries of executive order reservations should be made by Congress alone. § 4, 44 Stat. 1347.

[7] See 14 Op. A. G. 181 (1873). But *cf.* 17 Op. A. G. 258 (1882).

The government therefore does not deny that the executive orders of 1875 and 1876 involved here were effective to withdraw the lands in question from the public domain. It contends, however, that this is not the issue presented by this case. It urges that instead we are called upon to determine whether the President had the power to bestow upon the Sioux Tribe an interest in these lands of such a character as to require compensation when the interest was extinguished by the executive orders of 1879 and 1884. Concededly, where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Klamath Indians*, 304 U. S. 119. Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority. The basis of decision in *United States* v. *Midwest Oil Co.* was that, so far as the power to withdraw public lands from sale is concerned, such a delegation could be spelled out from long continued Congressional acquiescence in the executive practice. The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were thought by the executive and Congress to flow from the establishment of executive order reservations.[8]

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[8] This question is an open one. It is true that language appearing in two decisions of this Court suggests that the tribal title to a reservation is the same whether the reservation has been created by statute or treaty or by executive order. Re Wilson, 140 U. S. 575, 577; Spalding v. Chandler, 160 U. S. 394, 403. Cf. C. N. Cotton, 12 L. D. 205 (1899); William F. Tucker et al., 13 L. D. 628 (1891). In Re Wilson, however, it was conceded by all concerned that an executive order reservation was "Indian country" within the meaning of that term as it appeared in certain statutes defining the criminal jurisdiction of United States courts and territorial courts. No question was raised by the case with respect to the character of the tribe's interest in the reservation. Moreover, the dictum referred to was based upon the assumption that the Allotment Act of 1887 (24 Stat. 388) amounted to a Congressional recognition of tribal title to executive order reservations. The invalidity of this assumption is demonstrated in a later portion of our opinion. The issue in Spalding v. Chandler concerned the effect of the Pre-emption Act of September 4, 1841 (5 Stat. 453) upon an Indian reservation created by treaty and preserved by executive order and did not involve a determination of whether the Indians enjoyed a compensable interest in an executive order reservation. And twenty-eighty years thereafter when the Attorney General ruled, on the authority of United States v. Midwest Oil Co., that executive order reservations

It is significant that the executive department consistently indicated its understanding that the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations. The annual reports of the Commissioner of Indian Affairs during the years when reservations were frequently being established by executive order contain statements that the Indians had "no assurance for their occupation of these lands beyond the pleasure of the Executive,"[9] that they "are mere tenants at will, and possess no permanent rights to the lands upon which they are temporarily permitted to remain,"[10] and that those occupying land in executive order reservations "do not hold it by the same tenure with which Indians in other parts of the Indian Territory possess their reserves."[11]

Although there are abundant signs that Congress was aware of the practice of establishing Indian reservations by executive order, there is little to indicate what it understood to be the kind of interest that the Indians obtained in these lands. However, in its report in 1892 upon a bill to restore to the public domain a portion of the Colville executive order reservation, the Senate Committee on Indian Affairs expressed the opinion that under the executive order "the Indians were given a license to occupy the lands described in it so long as it was the pleasure of the Government that they should do so, and no right, title, or claim to such lands has vested in the Indians by virtue of this occupancy."[12]

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were not a part of the public domain for purposes of the General Leasing Act of 1920 (41 Stat. 437), he took occasion to remark: "Whether the President might legally abolish, in whole or in part, Indian reservations once created by him, has been seriously questioned (12 L. D. 205; 13 L. D. 628) and not without strong reasons; for the Indian rights attach when the lands are thus set aside; and moreover, the lands then at once become subject to allotment under the General Allotment Act. Nevertheless, the President has in fact, and in a number of instances, changed the boundaries of executive order reservations by excluding lands therefrom, *and the question of his authority to do so has not apparently come before the courts.*" 34 Op. A. G. 171, 176 (emphasis added).

[9] Annual Report of Commissioner of Indian Affairs (1872), H. R. Exec. Doc., 42d Cong., 3d Sess., Vol. III, No. 1, part 5, p. 472.

[10] *Id.* (1878), H. R. Exec. Doc., 46th Cong., 3d Sess., Vol. IX, No. 1, part 5, p. 486; *id.* (1880), H. R. Exec. Doc., 46th Cong., 3d Sess., Vol. IX, No. 1, part 5, p. 96.

[11] *Id.* (1886), H. R. Exec. Doc., 49th Cong., 2d Sess., Vol. 8, No. 1, part 5, p. 88.

[12] S. Rep. No. 664, 52d Cong., 1st Sess., p. 2.

Petitioner argues that its position finds support in Section 1 of the General Allotment Act of February 8, 1887,[13] which provides:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and, he hereby is, authorized . . . to cause said reservation . . . to be surveyed . . . and to allot the lands in said reservation in severalty to any Indian located thereon . . . ."

By Section 5 provision was made for issuance of patents to the allottees by which the United States promised to hold the lands in trust for the allottees and their heirs for 25 years and thereafter to convey to them full title. Petitioner urges that by including executive order reservations within the provisions of this Act, Congress revealed its belief that the degree of ownership enjoyed by Indian tribes is identical whether the reservation is created by treaty, statute, or executive order. But there is much to contradict this interpretation. For example, during the course of the debate on the measure Senator Dawes, a member of the Committee reporting the bill, frequently distinguished between the character of title enjoyed by the Indians on statute and treaty reservations and that enjoyed by those on executive order reservations, and no exception was taken to his remarks. 17 Cong. Rec. 1559, 1630, 1631, 1763. Moreover, in its 1892 report on the bill to abolish a portion of the Colville reservation, to which we have referred, the Senate Committee on Indian Affairs explained:

"An erroneous idea seems to have grown up, that the Indian allotment act [of 1887] and its amendments have given additional sanctions to executive reservations, and operated to confer titles upon the Indians occupying them they did not before possess. . . . At the time of the enactment of this statute, there were fifty-six executive reservations, embracing perhaps from 75,000,000 to 100,000,000 acres of the public lands, in which the Indians had no right or claim of title and which could be extinguished by act of the President. It would be preposterous to place such a construction upon the language of this act as would divest the United States of its title to these lands."[14]

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[13] 24 Stat. 388.

[14] S. Rep. No. 664, 52d Cong., 1st Sess., p. 2.

This statement by the Committee which reported the general Allotment Act of 1887, made within five years of its passage, is virtually conclusive as to the significance of that Act. We think that the inclusion of executive order reservations meant no more than that Congress was willing that the lands within them should be allotted to individual Indians according to the procedure outlined. It did not amount to a recognition of tribal ownership of the lands prior to allotment. Since the lands involved in the case before us were never allotted—indeed, the executive orders of 1879 and 1884 terminated the reservation even before the Allotment Act was passed,—we think the Act has no bearing upon the issue presented.

Perhaps the most striking proof of the belief shared by Congress and the executive that the Indians were not entitled to compensation upon the abolition of an executive order reservation is the very absence of compensatory payments in such situations. It was a common practice during the period in which reservations were created by executive order for the President simply to terminate the existence of a reservation by cancelling or revoking the order establishing it. That is to say, the procedure followed in the case before us was typical. No compensation was made, and neither the government nor the Indians suggested that it was due.[15] It is true that on several of the many occasions when Congress itself abolished executive order reservations, it provided for a measure of compensation to the Indians. In the Act of July 1, 1892, restoring to the public domain a large portion of the Colville reservation[16] and in the Act of February 20, 1893 restoring a portion of the White Mountain Apache Indian Reservation,[17] Congress directed that the proceeds from the sale of the lands be used for the benefit of the Indians. But both acts contained an explicit proviso: "That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of said . . . Reservation, whether that hereby restored to the public domain or that still reserved by the government for their use and occupancy." Consequently, the granting of compensation must be regarded as an act of grace rather than a recognition of an obligation.

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[15] See, *e. g.*, Department of the Interior, *Executive Orders Relating to Indian Reservations*, Vol. I, pp. 5, 6, 21, 30, 37, 43, 44, 48-50; Hearings before a Subcommittee of the Committee on Indian Affairs on S. 1722 and S. 3159, 69th Cong., 1st Sess., pp. 104-105.

[16] 27 Stat. 62, 63.

[17] 27 Stat. 469, 470.

We conclude therefore that there was no express constitutional or statutory authorization for the conveyance of a compensable interest to petitioner by the four executive orders of ~~1874~~ 1875, and ~~1875~~, and that no implied Congressional delegation of the power to do so can be spelled out from the evidence of Congressional and executive understanding. The orders were effective to withdraw from sale the lands affected and to grant the use of the lands to the petitioner. But the interest which the Indians received was subject to termination at the will of either the executive or Congress and without obligation to the United States. The executive orders of 1879 and 1884 were simply an exercise of this power of termination and the payment of compensation was not required.

Affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.